1947

File No. Cr. A. Kanara

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Legal **DEPARTMENT**

A **BRANCH**

Subject:— Criminal Appeals in the High court of Bombay against the order of acquittals from Kanara District.

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Judgment record by the High Court in Criminal Appeal No. 14 of 1947, Imperator versus Damodar Bagappa Shanbhag.

The Government Pleader for the Crown,
Counsel Mr. E.B.Ghaswala with Mr. M.S.Anikhindi for the accused.

Coram:- Chagla and Gajendragadkar, JJ.

28th March 1947.

Oral Judgment (per Gajendragadkar, J.):- This is an appeal against acquittal filed by Government of Bombay in respect of a charge framed against the accused Damodar Nagappa Shanbhag, alleging that he had committed offences punishable under section 6(1) of the Vegetable Oil Products Control Order and under section 13 of the Hoarding and Profiteering Prevention Ordinace and had made himself punishable under section 81(4) of the Defence of India Rules.

The case for the prosecution was that on the 16th June 1946 at about 4 or 5 p.m. the accused sold to the complainant three tins of Dalda at Rs.10-4-0 each whereas the control price for each of the said tins was less than that amount. It was also alleged that the accused did not give a cash memo to the purchaser as he was bound to under section 10 of the Hoarding and Profiteering Prevention Ordinance. The learned Magistrate before whom the case was tried took the view that the provisions of the Vegetable Oil Products Control Order had not been duly published as required by rule 119 of the Defence of India Rules and since the accused had pleaded ignorance of the provisions of the said order the learned Magistrate held that even if the accused had charged the price in excess of the control price he could not be held to be liable for punishment.

It may be mentioned that the prosecution had failed to prove otherwise that the accused had knowledge of the provisions of this Order. On this view the learned Magistrate acquitted the accused of the offence under the Profiteering Ordinance.

As regards the charge based on the fact that no cash memo was given to the customer the learned Magistrate was disposed to think that since the matter would ordinarily be governed by Vegetable Oil Products Control Order and since there was no provision in the said Order corresponding to the provision of section 13 of the Hoarding and Profiteering prevention Ordinance the prosecution could not legitimately levy a charge against the accused on this count. On that view he acquitted the accused also of the other charge. Against this order of acquittal the Government of Bombay have preferred the present appeal.

As to the question whether the Vegetable Oil products Control Order and the instruction under it had been duly published or not the learned Government Pleader has invited our attention to the fact that the authority issuing the said ordinance had itself directed how it should be published and he argues that the method of publication having been decided by the authority the only question which arises for decision is whether the publication had, in fact, taken place as directed. It had been directed by the authority issuing this Order that the Order should be published in the Government Gazette and the summary of the material provisions of the Order should be published by Government by issuing a communique in that behalf. Accordingly the Order was published in the Government Gazette, but there is no evidence to show that the communique had been issued by local Government as directed by the authority issuing the order in the first instance. That being so, it seems to us that the learned Magistrate

~~was right in holding~~

was right in holding that the order had not been duly published as required by rule 119 and no charge could legitimately be levied against the accused for having sold the articles in question at a price higher than the control price.

With regard to the charge based upon the failure of the accused to have issued a cash memo the learned Magistrate took the view that the evidence of the customer showed that he had asked for a cash memo only if the accused had insisted upon selling the tins at the excessive rates. Since the difference between the price charged and the control price was eventually returned by the accused to the customer the learned Magistrate apparently held that there was no compulsion on the accused to have issued a cash memo. That, however, is not correct. The learned Magistrate also held that since the Vegetable Oil Products Control Order exhaustively dealt with the transactions falling under that Order the provisions of the Hoarding and Profiteering Prevention Ordinance could not properly be applied to the transactions giving rise to the present complaint. On this point again the learned Magistrate is obviously wrong. The provisions of the Hoarding and Profiteering Prevention Ordinance apply to all transactions alike and section 17 of the said Ordinance expressly provides that the provisions such as those of section 13 in the Ordinance are in addition to the provisions that may have been made in other Orders or Ordinances. Mr. Ghaswala who appears for the accused has fairly conceded that in law the finding of the learned Magistrate could not be sustained. That being so, it must be held that the accused was guilty of the offence pubishable under section 13 and as such was liable to be proceeded against under section 81(4) of the Defence of India Rules. That raises the question as to sentence. It is obvious that the main charge for which the accused was prosecuted related to the prosectution case that he had sold the

articles at a price higher than the control price. That charge, however, cannot be sustained for the reasons already mentioned. That being so, we think the ends of justice would be met if the accsed is sentenced to pay a fine of Rs.250.

We accordingly convict the accused of the offence punishable under section 13 of the Hoarding and Profiteering prevention Ordinance and sentence him to pay a fine ofRs.250. In default of payment of fine we direct that the accused should undergo rigorous imprisonment for two months. The appeal is accordingly partly allowed.

In the Court of the Sessions Judge, of Kanara,
at Karwar.

Criminal Appeal No:19 of 1947.

1. Purushottam Jog Naik.
2. Babani Jog Naik ... Appellants
(Original accused Nos.1 and 2)

versus.

Emperaator.

Pleader for the appellants Mr.Gokarn V.S.

Pleader for the Crown, the Public Prosecutor

The appellants have been convicted on a trial held on the 26th of May 1947 by B.S.Bapat, Esquire, Resident Magistrate, First Class, Karwar in the district of Kanara of offences punishable under sections 143 and 152 of the Indian Penal Code and No.1 sentenced to suffer rigorous imprisonment for two months and rigorous imprisonment for nine months and to pay a fine of Rs.200/- or in default to suffer further rigorous imprisonment for three months for the respective offences; and no.2 sentenced to suffer rigorous imprisonment for two months and rigorous imprisonment for six months and to pay a fine of Rs.200/- or in default to suffer further rigorous imprisonment for three months for the respective offences. The sentences of imprisonment in respect of both the accused to run concurrently in respect of both the offences.

2. Two brothers appeal against the order passed by the Resident Magistrate First Class, Karwar Town, convicting them for offences under sections 143 and 152 of the Indian Penal Code and sentencing them to specified terms of imprisonment and to pay certain fines. In default of payment of fines they were each to undergo further rigorous imprisonment for three months.

3. The prosecution case was this. One Ganpat Nadkarni had obtained a rent decree in an assistance suit in the Mamlatdar's Court against his tenant Purshottam Jog Naik (accused no.1), but the dues were not paid and all attempts to recover the same as arrears of land revenue had proved futile. Finally the Mamlatdar Mr.Joshi of Karwar taluka got the notice Ex.1-A served through the Village Officers on accused no.1 requiring accused no.1 to leave his residential quarters and other buildings and lands open for the attachment of moveables therefrom in recovery of the aforesaid decretal debt. The date fixed for execution of the warrant was 18.1.1947.

4. On that date the Mamlatdar went to accuseds' village. He anticipated lot of trouble. That is why he had taken with him a force of 50 constables, two Sub-Inspectors and one Home Inspector. The Mamlatdar found accused no.1 sitting outside in the compound of his property. When questioned accused no.1 said that he knew why the Mamlatdar had gone there. Accused no.1 directed them to go into a out-house called chowki and get whatever they wanted therefrom. The Mamlatdar and the panchas entered into that chowki, but found nothing worth attaching, vide the panchanama Ex.1-B. The Mamlatdar knew on information received some days ago that accused No.1 had been living

in the house which was in front of the aforesaid chowki. Accordingly, the Mamlatdar informed accused no.1 that he would go into that building But in the verandah of that house several people had gathered and sat. They were about 100 or so. Most of them were women. Even inside the house there were some people. They would not give any passage to the Mamlatdar though he asked them several times to move away and make a way for him to go into that house. Finding that the whole crowd was determined to resist him he warned them that he would be compelled to declare the assembly to be unlawful and that the matter would be handed over to the police who might use force. Even then the crowd did not listen. Accordingly the Mamlatdar declared the assembly to be unlawful and commanded the people to disperse. But they did not obey. He therefore lodged his complaint Ex.1-C then and there with the Police Sub-Inspector and required him to take the necessary steps. Thereupon the Police Sub-Inspector got more force by the call of his bugle and used force against some by dragging women out from the verandah. Thereupon the crowd dispersed and went away though four persons including accused nos. 1 and 2 (who are brothers inter se) remained without going away. The Mamlatdar took them to be the leaders for they had been asking the people to obstruct and not to give him entrance. The police arrested those four persons.

5. Thereafter the Mamlatdar and the panchas entered into that house and attached 33 khandis of paddy, some handas and 3 or 4 utensils in satisfaction of the decretal claim of Rs.390 under the panchanama Ex.1

6. The aforesaid four persons who were arrested by the police were sent up to the Resident Magistrate, First Class, Karwar Town for trial for offences punishable under sections 143 and 152 and 145 of the Indian Penal Code.

7. All the four persons pleaded not guilty. Accused nos. 1 and 2 stated that there was no unlawful assembly at all; nor did the Mamlatdar declare it to be unlawful, nor asked the people to disperse. They further denied that they obstructed the Mamlatdar in the discharge of his his lawful duties. They further said that accused no.1 and his three brothers were all divided inter se about 3 or 4 years ago. Accused no.1 lived only in that chowki; while the house from which the aforesaid paddy and utensils were attached belonged exclusively to accused no.1's divided brothers including accused no.2. The Mamlatdar had therefore no right to go into that house of accused no.2 in which accused no.1 did not reside at all; nor did the attached property or any property in that house belongs to accused no.1. They therefore said that the entire proceedings were illegal.

8. The learned Magistrate acquitted all the four persons of offence under section 145, Indian Penal Code. He also acquitted accused nos. 3 and 4 of all the offences with which they had been charged and convicted accused nos. 1 and 2 only for offences under sections 143 and 152 of the Indian Penal Code. Accused nos. 1 and 2 were each awarded two months' rigorous imprisonment under section 143. Accused no.1 was further sentenced to nine months' rigorous imprisonment and was fined Rs.200/- under section 152, Indian Penal Code. Accused no.2 was however given six months' rigorous imprisonment and fined Rs.200/- for the same offence. In default of payment of fine each accused was to undergo three months' further rigorous imprisonment. Hence this appeal by accused

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nos.1 and 2.

9. The following questions arise for my consideration :-

(1) Whether accused nos. 1 and 2 were members of an assembly to resist the Mamlatdar's execution of distraint warrant?

(2) Whether the said warrant was a legal process, or its execution was in exercise of the lawful powers of the Mamlatdar for entry into the residential house ?

(3) Whether accused nos.1 and 2 obstructed the Mamlatdar while he was endeavouring to disperse the assembly ?

(4) Whether the said assembly was unlawful ?

10. My findings are :-

(1) Yes;
(2) No on both points.
(3) No;
(4) No.

Reasons.

11. Questions involved in issues nos. 1 and 3 relate to facts whil those under issues nos. 2 and 4 are questions of law. The application of law becomes easy when once the facts are ascertained in the light of the evidence adduced. The admitted facts are these. A rent-decree was passed in an assistance suit in favour of the decree-holder Wadkarni (Ex.3) and against Purushottam Jog Naik (accused no.1). For non-payment steps were taken, but in vain. Finally the notice Ex.1-A was issued by the Taluka Mamlatdar Mr.Joshi on 8.1.1947 and it was served on accused no.1 on 9.1.1947. That notic intimated accused no.1 that the Mamlatdar was to visit his resident quarters and other buildings and lands with a view to attach his moveables in recovery of the decretal dues of Rs.390 and odd. It therefore called upon accused no.1 to keep the aforesaid property open and not to cause any obstruction. But from accused no.1's written statement tendered in the lower court at Ex.4A it seems that he pleaded satisfaction of decretal dues. For he complained there that though he had paid off the decree-holder's dues still his property was sought to be attached. But the fact of the notice Ex.1A having been served on accused no.1 and his knowledge that the Mamlatdar was to go to his place on 18.1.1947 for execution of the warrant of distraint are admitted.

12. It is therefore now necessary to find out what exactly happened when the Mamlatdar went to the place on 18.1.1947. The very fact that the Mamlatdar had taken the precaution of a guard in the shape of police force and the sworn testimony of the Mamlatdar as to what had happened on the previous occasion when the Circle Inspector had attempted to attach the moveables of accused no.1 in satisfaction of the aforesaid decree leave no doubt in the mind that troubles as expected did arise. It is clear from the prosecution evidence that the entire village as well as the neighbouring villages have all joined what is known as Kisan Sabha with the result that the prosecution could get no witness to testify to what had happened. It was therefore stated in the lower court that panchas were taken over from comparatively distant

villages. No one could be found willing enough to serve as a panch. This indicates what influence the Kisan Sabha wields over the villagers in Ulga and nearby villages. But however the prosecution examined the Mamlatdar at Ex.1, the panch Vithal at Ex.2 and the decree-holder Nadkarni at Ex.3 and the P.S.I. Mr.Ullagadde at Ex.9. When for no fault of the prosecution the eye-witnesses are not available I think th court of law should endeavour to find out the truth as best as it may even on the evidence of a solitary witness. Here the Mamlatdar (Ex.1) swore that he first met accused no.1 outside his premises. When questioned accused no.1 told the Mamlatdar that he knew the object of the Mamlatdar's visit. So saying he directed them to go to the chowki. The Mamlatdar and the panchas entered into that chowki and made a thorough search of the same. They found an old woman of advanced age in the chowki and a few wearing apparels (which are exempt from attachment), a few earthern pots (which were not worth attachment) and a hearth of Indian fashion. No article worth attachment was found therein as noted in the panchanama Ex.1B which was drawn up then and there. It seems that accused no.1 had deliberately directed the Mamlatdar and the panchas to search the chowki where no property worth attachment was kept. The accused's suggestion to the Mamlatdar during the cross-examination and the accused no.1's statement at Ex.4A to the effect that the Mamlatdar failed to search a western wing of chowki where some rice of accused no.1 had been kept are, in my opinion, altogether unfounded. No officer worth his office could neglect to mak a search of any wing of the building which he enters into for the avowed object of attaching property therefrom in satisfaction of the decretal dues. I cannot bring myself to believe that the Mamlatdar neglected or failed to search the western wing or to find rice therefro if it were really there. The Mamlatdar swore and I believe that he mad a search of the entire building but found nothing. His search of the entire building is, in my opinion, in consonance with the expectation of common sense and the probabilities of the case.

12. From the chowki the Mamlatdar and the panchas came out. The Mamlatdar said that he knew from information that he had received 8 day before that accused No.1 and his brothers had been all staying together as members of an undivided Hindu family. The big house was in front of the chowki and the Mamlatdar proposed to go into that building. But the Mamlatdar found that in order to cut off the passage from outside hundreds of women had been sitting on the verandah. Here slightly conflicting versions are given. Accused no.1 said that he informed the Mamlatdar that the chowki alone belonged to him and that he had no right or interest in the house which belonged exclusively to accused no.2 and other brothers. But the Mamlatdar denied that he was so informed. The panch Vithal (Ex.2) supported the accused on this point by saying that the Mamlatdar was informed by the accused that the house which he proposed to enter into belonged to accused no.2 and not to accused no.1. Seeing that accused nos.1 and 2 were there with sever people of the village and had taken care to pack the verandah to the last inch so as to cut off the Mamlatdar's proposed or expected entranc into that building, I think that accused nos. 1 and 2 must have informe the Mamlatdar that the house belonged to accused no.2. If the accused had not even intended to inform the Mamlatdar so why is it that accused

no.1 pointed out a chowki as his residence where nothing worth attachable was found? The pointing out of the chowki as his residence testifies to his intention that the Mamlatdar should not enter into the house at all. A person who had such an object in view cannot be believed to have failed to inform the Mamlatdar that the house did not belong to him (accused no.1) and that the same belonged to accused no.2. I do not think that the Mamlatdar gave a correct version on this point. Probably his memory failed him.

13. The Mamlatdar swore that on finding that his entrance into the building was cut off by the women sitting on the floor of the verandah, he asked them to let him go into the house. One of the women who had gathered there for the avowed object of obstruction questioned the Mamlatdar as to who he was to ask them to go away from the house where they had been invited by the owner for some ceremony. The Mamlatdar replied that he did not ask them to go but only into make a way for him and to let him pass through the verandah in the house. Thereupon some women told the Mamlatdar that the house belonged to them. But the Mamlatdar looked at and scrutinised the women and found some of them to be Christians. He therefore questioned 5 or 6 women if the house belonged to them. But they kept quiet. He too knew that they had only given him a false story of the house as having belonged to them. The Mamlatdar then called upon them repeatedly to give him a passage to get into the house. But they did not listen. Accused nos.1 and 2 had been all the time instigating those women and people who had gathered there to obstruct the Mamlatdar at all cost and not to let him enter into the house at all. The Mamlatdar stated in the examination-in-chief that accused no.1 instigated the people to oppose him by sticks and axes and not to allow him to enter. He again swore that all the four persons (who figured as accused in the lower court) instigated the people to oppose. The Mamlatdar therefore took them to be the leaders. Even during the cross-examination he stuck to the story by saying that accused nos. 1 and 2 told the people to obstruct and not to allow him to enter. Accused no.2 even said that he would see how the Mamlatdar would enter. The decree-holder Nadkarni (Ex.3) stated that all the four persons including accused nos. 1 and 2 instigated the women to obstruct. To the same effect is the evidence of the P.S.I. Mr.Ullagadde at Ex.9. I see no reason to discard this part of the prosecution evidence, specially seeing that it is quite consistent with the natural developments of the situation. Accused nos.1 and 2 who had collected the people before hand would not have surely kept quiet with folded hands leaving those people and the authorities to themselves. I believe that accused nos. 1 and 2 instigated those people not to allow the Mamlatdar to enter into the house. I have therefore not the least doubt that accused nos. 1 and 2 instigated the resistance to the Mamlatdar's execution of the warrant of attachment.

14. On finding that all peaceful means failed, the Mamlatdar was compelled, I believe, to declare that the assembly was unlawful. Though I have my own views about the nature of this assembly, the evidence makes it clear to me that as a matter of fact the Mamlatdar declared the assembly to be 'unlawful'. For he found that the accused wanted to resist him and he believed that he had the lawful power to execute the warrant which was in his opinion a

legal process. However erroneous that view might be the fact remains that he declared that assembly to be unlawful. The very fact that he lodged the complaint then and there with the Police Sub-Inspector and asked him to take further steps as the people did not disperse to his command would show that the Mamlatdar must have declared the assembly to be x unlawful and called upon it to disperse I cannot therefore bring myself to believe the statements of accused nos. 1 and 2 at Exs.4A and 5A to the effect that the Mamlatdar did not ask them to disperse or declare the assembly to be unlawful.

15. I therefore hold on evidence that the people had assembled and an assembly was formed. I further believe that the object of the assembly was to resist the execution of the warrant by the Mamlatdar. I reserve for the time being the discussion of the question whether the aforesaid warrant was a legal process or whether the assembly was an unlawful one.

16. As to what happened after the Mamlatdar's declaration of the assembly to be unlawful is again in controversy. But I accept the prosecution evidence and hold that the people did not disperse till the police began to use force. But in order to understand the precise offence contemplated by section 152 of the Indian Penal Code (of which the accused nos. 1 and 2 were convicted by the lower court) it is necessary to see what exactly the charge was against them. The charge was framed by the learned Magistrate at Ex.8 saying that the accused "obstructed the Mamlatdar of Karwar in the discharge of his duty as a public servant in endeavouring to disperse an unlawful assembly." The obstruction specifically mentioned in the charge is the obstructio to the Mamlatdar. It was held in I.L.R. 19 Calcutta, 105 (Ferasat v. Queen-Empress) that section 152 contemplates an assault or obstruction to some particular public servant. Here the evidence is not quite satisfactory regarding the obstruction caused to the Mamlatdar. It seems that the x investigating police had sent up the charge-sheet to the Magistrate complaining that the obstruction was made to the police force in endeavouring to disperse the unlawful assembly. But the Magistrate after hearing the evidence for the prosecution thought fit to frame the charge saying that the accused caused obstruction to the Mamlatdar. That being so, I do not think that the accused deserved to be punished if the evidence showed that they obstructed the police force. The aforesaid Calcutta ruling is also xx an authority for the view that mention of police force as such in the charge will not do. But the persons obstructed ought to be specified. I must therefore confine my enquiry to the obstruction as alleged to be made to the Mamlatdar.

17. The Mamlatdar himself admitted during the cross-examination that he did not personally endeavour to disperse the crowd. He therefore stated that obstruction by accused no.2 to him in the work of dispersing did not therefore arise at all. The reason given by him is that he did not personally try to disperse. The same reason and the same logic ought to apply to accused no.1 as well. If the Mamlatdar did not try to disperse the assembly I wonder how the question of accused no. 1's obstruction could have arisen at all

notice having been served at the said building not less than seven days before such entry." This proviso being the only provision that provides for an entrance into a human dwelling is required in my opinion to be strictly followed. It says that no human dwelling shall be entered without the consent of the occupier thereof or without a notice having been served at the said building. The Mamlatdar's entrance into the house could only be therefore justified either on the consent of accused no. 1 or on the proof of notice having been served at the said building. The Mamlatdar's entrance into the house could only be therefore justified either on the consent of accused no.1 or on the proof of notice having been served at the said building.

21. The learned Public Prosecutor urged that accused no.1 himself directed the Mamlatdar and the panchas to go into the chowki and therefore that entrance was made with the consent of the owner. That is quite so. On that consent, he further argued that the consent to enter into the house must be presumed to have been given it being only entrance into the another part of the building, viz., the house. This argument is, in my opinion, erroneous. The chowki and the other house did not constitute one and the same building. They were indisputably two separate buildings with some space in between. The records are by no means clear to me as to how far they are away though it is clear that they are two separate buildings. Because accused No.1 directed the Mamlatdar and the panchas to go into the chowki I cannot presume that he consented to their entry into the house. But the evidence is, as I have already stated, to the effect that the Mamlatdar was told that the house belonged not to accused no.1 but to accused no.2 and that he should not therefore go there at all. I have already held that fact to be true though the Mamlatdar stated to the contrary. Here the so-called presumption does not in the first place arise and in the second place it was negatived by the Mamlatdar being told not to go into that house. The justification of the Mamlatdar's entry on the basis of the consent of the owner does not therefore stand.

22. The notice is required by the aforesaid provision to be served at the building. When this proviso was read out to me in the course of arguments I questioned as to what the evidence showed as regards the place and the manner in which the notice Ex.1-A was served. I was surprised to hear that the evidence was altogether silent about it. Even the endorsement of service made by the Village Officers below Ex.1-A was silent as to the manner and the place of service. The learned Public Prosecutor said that the prosecution had not touched that question at all in the lower court. But in the ends of justice I desired, for reasons given below the appeal-memo to take further evidence on this question as both sides said that they were not aware of this aspect of the question. For the accused too had not raised this question in their appeal memo.

23. The Village Officers the Patil and the Shanbhog were accordingly called and examined before me at Exs.13 and 14. They admitted that they served the notice on accused no.1 and made the endorsement regarding the service. They further stated that accused no.1 was served not in any of his dwelling houses but in a certain

tea-shop in a neighbouring village. The learned Public Prosecutor tried to bring out from their cross-examination that they are mortally afraid of the Kisan Sangh and its activities and its members. It was therefore suggested that out of fear they now say that accused no. 1 was served not in his dwelling house but elsewhere. This suggestion was made to the witnesses. Though they admitted that they feared the Kisan Sangh and its members, still they said that the truth was that they served the notice on accused no.1 in a tea-shop. The Shanbhog further added that he was not saying so out of his fear of the Kisan Sabha or its members. The result is that the endorsement is silent about it and the prosecution evidence is also silent. The serving officers when called and questioned say that it was served on accused no.1 in a tea-shop in a neighbouring village. It may be that the Village Officers fear the Kisan Sabha. But on that account I am not prepared to say that they should now be believed to have served the notice on accused no. 1 in the dwelling house. At the most one could only say in view of their admitted fear of the Kisan Sabha that their testimony is not free from doubt. It is therefore a doubtful question as to where accused no.1 was served. The benefit ought to go to the accused.

24. In view of these reasons I hold that the notices Ex.1-A though required by law to be served at the building which was intended to be entered into by the warrant executing authorities, is not proved to have been so served.

25. The learned Public Prosecutor drew my attention to certain Rules framed by the Government regarding the entry into the premises for the purposes of distraint. Those Rules are published at page 1245 of Gupte's Bombay Land Revenue Code, 2nd edition. The Government Resolution runs thus :- "In exercise of the powers conferred by sub-sec sub-section (1) of section 214 of Bombay Land Revenue Code, 1879, the Governor in Council is pleased to make the following rules regulating entry into any premises by any officer empowered under section 154 of the said Code for the distraint of moveable property of a defaulter :- 1. Service of Notice.- Where an officer in exercise of his power of distraint under section 154 of the Bombay Land Revenue Code, 1879 intends to enter any building used as a human dwelling, the notice required by the proviso to section 200 shall be served by presentation to the defaulter or to any adult male member of his family present in the building, or failing either of the aforesaid methods, by being affixed to any prominent part of the building." The learned Public Prosecutor argued that under this rule framed by the Government it would do even if the defaulter is served elsewhere by presentation of the warrant. He therefore said that the Village Officers having sworn that the defaulter accused no.1 was served personally the requirement of ~~xx~~ law should be held to be fulfilled. I do not agree. In the first place the rule of service does not sustain the interpretation that it would do if the defaulter is served by presentation anywhere. In my opinion the expression "present in the building" would qualify as much the "defaulter" as the "adult male member" of his family. I do not agree with the learned Public Prosecutor that the expression "present in the building" qualifies only adult male member of his family. That expression should, in my opinion, be taken as qualifying even the defaulter. If it ~~xxx~~ were not so, then I should say that the rule goes beyond and is inconsistent with the

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proviso to section 200 of the Bombay Land Revenue Code. For, I have already pointed out that the aforesaid proviso requires a notice to be served at the building. If the rule framed says that it is not necessary or that the defaulter can be served by personal presentation anywhere or even in a tea-shop of any village whatsoever in order to get the lawful authority to enter into the defaulter's house, then the rule seems to me to be ultra vires. Section 214 empowers the Government to frame such rules as are not inconsistent with the plain provision of law contained in the Land Revenue Code itself. It has power to frame rules to carry out the ~~xxx~~ purposes and objects of the provision of the Land Revenue ~~R~~ Code and not to make rules inconsistent with those provisions. I therefore believe that under both the aforesaid ~~provisix~~ proviso to section 200 and the Rules framed by the Government the notice Ex.1-A was required to be served at the building if the Mamlatdar were to get the lawful authority to enter into that particular building.

26. I was told that if notice ~~x~~ is required by law to be given at a certain building in order to enable the Revenue Authorities to enter into that house seven days later, then it would amount virtually to a notice to him to remove all his property therefrom and to defeat every possible warrant. I quite see the point. But if this is the usual trouble in execution~~xx~~ of warrants of destraint then the remedy lies not in asking the court ~~x~~ to interpret the law in favour of a particular action already taken by the executive but to get the law itself suitably amended. But giving my best consideration to the requirements of law I am unable to agree with the prosecution that Ex. A not being proved to have been served at the building which the Mamlatdar proposed to enter (after finishing with chowki) it gave any legal authority to the Mamlatdar to enter into the house in question. If so, I cannot bring myself to hold that the Mamlatdar's execution of the warrant was in exercise of the lawful power of public servant or that it was executed as a legal process for the purpose of entry into the house in question.

27. I.L.R.29 Calcutta, 244 (Uma Charan Singh v. Emperor) is an authority for the view that where resistence is made to the execution of a warrant, which is not lawful, no offence under section 147 of the Indian Penal Code is committed. There a certain warrant issued by a Civil ~~x~~ Court was found to be not a legal one. The execution of that warrant was resisted. But the resistance was held not to constitute an offence ~~xxx~~ punishable under section 147 of the Indian Penal Code. Here, Ex.1-A having not been served at the building it cannot be construed to have vested the Mamlatdar with a lawful power or authority to enter into the house in question. The resistance to his entrance into the house which he was not by law authorised or competent in law to enter is not, in my opinion, punishable under section 143, Indian Penal Code. If so the assembly was not in law an unlawful one.

28. It was next argued by the prosecution that the law recognises no private defence of property against those who purport to act under the colour of their office. This argument does not, in my opinion, hold water. The accused nos. 1 and 2 cannot be said to have offered resistance in defence of their property. That right has got to be ~~x~~

kept distinct and separate from the right they exercised in resisting the Mamlatdar's entrance into the house which he was not competent in law to enter.

29. At one time the Public Prosecutor argued that the warrant having been issued in due course of official business and having been served similarly, it should be presumed to have fulfilled all the requirements of law. That argument does not now sustain since the new evidence recorded by me as aforesaid now makes it clear that Ex.1-A was served not at the building but in a certain tea-shop. The presumption is therefore negatived by the positive evidence.

30. For these reasons I hold that the assembly cannot be called to have been an unlawful one either under the first or the second clause of section 141 of the IndianPenal Code; nor nor can I say that the resistance to the Mamlatdar in execution of the warrant was punishable under section 143 of the Indian Penal Code. If only the warrant issuing authorities had taken care to see that their warrant was issued and served in strict fulfillment of the conditions laid down by law, I think that such unhappy result would not have occurred.

31. Before closing I must refer to the accuseds' story of partition. That is in my opinion a desperately false story. Accused no.1 stated at Ex.4A that he and his brothers divided 3 or 4 years ago. But there was no deed made about it. He further said that at that time there was no actual division in lands because of his intermitent residence in the village due to his participation in Kisan agitation. At another time in the same statement he said that he and his brothers were in actual vahivat and cultivation of their separated shares of lands. During cross-examination of the Mamlatdar it was suggested that there was a deed of partition and that even the existance of the deed was mentioned to the Mamlatdar. I wonder why such a false suggestion was made if according to accused no.1 himself no deed of partition has been made. Accused no.2 said that they found accused 1 busy in Kisan Sabha activities. They feared that accused no.1's participation in those activities might expose their family property to risk or danger. They therefore divided and kept accused no.1 separate. If the division was made for such a vowed object, I fail to understand why no dakhla was given at least to the Village Officers regarding the division. Panch Mallu whom the accused examined on this point of division said that the panchas advised the brothers to give a dakhla to the village officers. Still to this day no dakhla is given. Nor any writing made. Persons who have a certain fear and take steps to avoid it cannot be believed to have failed to protect themselves against what they feared. Mallu said that accused nos. 1 and 2 divided because accused no.1 being busy in Kisan Sabha activities was not available for work on the lands and that therefore the brothers thought that they were being put to loss. If so, then the lands would have been divided and given in separate shares to accused no.1. That was the only way in which accused no.1 could be made to work on his own lands instead of depending on his brothers' labour for him on the family lands. But the panch Mallu (Ex.10) stated that though they divided only the moveables they did not divide lands by metes and bounds. His

explanation was that accused no.1 said at that time that he would do it at his leisure as there was no time for him to look to that matter and so accordingly the lands were not divided by metes and bounds, or physically separated. But accused no.1 gave a different story. In the record of rights produced at Exs.5B to 5C there is a mention of 1/5th share against each brother with the endorsement that the property is joint. That again gives a lie to accused no.1's story of actual cultivation of separated shares. The story of division is therefore in my opinion, entirely false. It seems to me that the brothers continued to live joint as they had been doing hitherto. For some reason or the other accused no.1 wants to defeat the decree-holder's claim. In order to achieve the object a show of his present residence in the chowki by putting some wearing apparel and a few earthern pots and an old woman in the chowki was made and accused No.1 said that it was his residence. If rice had been kept in the western wing of that building the Mamlatdar can be trusted to have discovered and attached the same. All the property of accused No.1 had been kept in my opinion in the house where the Mamlatdar attempted to go into. But he was resisted. On facts I am satisfied that the accused nos. 1 and 2 resisted in order to save their property from attachment. But after all they escaped because of the technical flaw.

32. It is true that the accused nos. 1 and 2 did not resist the Mamlatdar's entry into that house on the ground on which they now escape. For they never objected to the illegality of the warrant or its non-service at the building. But it is for the prosecution to prove to the hilt that the Mamlatdar was competent in law to enter into that house or was executing the warrant in exercise of the lawful power vested in him and that the same was a legal process. The prosecution carried the burden of proof and they failed to discharge it by satisfactory evidence. The result is that the accused must get the benefit.

33. There seems to be a sound reason behind the requirement of law regarding service at the building. Disputes might well arise as they often do as to the ownership of the house whenever moveables therefrom are sought to be attached. The Legislature seems to have therefore provided to obviate such objections at the last moment by asking that notice to be served on the building seven days before. Such service will give a fair notice to all the claimants and will empower the officer to make a direct entry into the house for attachment without listening to any objections that might be raised on the spot.

34. In the result the appeal succeeds, no other point having been urged before me for consideration.

ORDER.

I allow the appeal and set aside the convictions and sentences of accused nos. 1 and 2 and direct that they be set at liberty forthwith.

2nd September 1947.

Sd. C.S.Deodhar,
Sessions Judge.

True Copy
Sd. D.M.Karana